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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 159

UNITED STATES OF AMERICA,
Appellant

vs.

ERNEST KING BRAMBLETT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Action No. 971-53

UNITED STATES OF AMERICA

vs.

ERNEST KING BRAMBLETT

MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellee moves that the judgment of the District Court be affirmed, on the ground that the question on which the decision of the cause depends is so unsubstantial as to require no further argument.

This is a direct appeal from an order of the United States District Court for the District of Columbia entered on April 14, 1954, which granted appellee's motion in arrest of judgment. A copy of the opinion of the District Court, which has not yet been reported, is appended to appellant's jurisdictional statement. Appeal papers were filed and served upon appellee on May 13, 1954.

Appellee was indicted on June 17, 1953, in eighteen counts, each of which charged that he wilfully falsified by a scheme a material fact, in a matter within the jurisdiction of a department and agency of the United States namely, the Dis-

bursing Office of the House of Representatives, in violation of 18 U.S.C. § 1001. Each of these counts alleged that appellee either filed or left on file with the Disbursing Office a so called Clerk Hire form, which designated a given individual to be a clerk to him in the discharge of his official duties, whereas in fact that individual was not such a clerk.

The District Court entered a judgment of acquittal on eleven counts at the close of the government's case. The jury found appellee guilty under the remaining seven counts. The court then granted appellee's motion in arrest of judgment on the ground that the indictment failed to charge an offense, because the Disbursing Office of the House of Representatives is not a department or agency of the United States within the meaning of 18 U.S.C. §1001.

Statutes Involved

18 U.S.C. §1001 provides as follows:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U.S.C. §6 provides as follows:

"As used in this title:

> "The term 'department' means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.

"The term 'agency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense."

Summary of Argument

Appellee has been indicted for violation of 18 U.S.C. §1001, which makes it a crime to falsify a material fact "in any matter within the jurisdiction of any department or agency of the United States." The term "department" has been defined for the purposes of Title 18 to mean the executive departments enumerated in 5 U.S.C. §1, which are the so-called Cabinet departments. 18 U.S.C. §6. The term "agency" has been defined for the purposes of Title 18 to mean "any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest." 18 U.S.C. §6.

The Disbursing Office of the House of Representatives is neither a "department" nor an "agency" of the United States within the meaning of the foregoing statutes. It is the duty of the Clerk of the House to disburse each Member's clerk hire allowance to those designated by that Member as his clerks. 2 U.S.C. § 92; Rules of the House of Representatives, Rule III. The particular section of the Clerk's office which discharges this duty is known as the Disbursing Office. See testimony of Harry Newlin Megill, which forms part of the record in this case.

It is clear that the office of the Clerk of the House is not one of the executive departments enumerated in 5 U.S.C. § 1, and hence that it is not a "department" within the meaning of 18 U.S.C. § 6. It is likewise clear that this office is not an "agency" within the meaning of § 6, for the term

"agency" as there defined is applicable solely to the executive branch of the government.

The legislative history of 18 U.S.C. § 1001 proves beyond dispute that Congress meant what it said when it restricted the applicability of this statute to the executive branch of the government. Any other conclusion would in effect nullify the perjury statute, 18 U.S.C. § 1621. Moreover, even if the matter were doubtful—which it is not—§ 1001 could not be stretched to cover the legislative branch because of the universally accepted rule that penal statutes must be strictly construed.

Consequently, since the only offense alleged in this case is the falsification of certain facts within the jurisdiction of the Disbursing Office of the House of Representatives, and since this office is neither a "department" nor an "agency" of the United States, the indictment fails to state any violation of 18 U.S.C. § 1001. There is no contention that it states a violation of any other federal statute. The court below, therefore, properly granted appellee's motion in arrest of judgment.

Argument

1. *Disbursing Office Not a "Department"*

In order to reach a proper disposition of this case, it is necessary to consider the legal character of the Disbursing Office of the House of Representatives. The Clerk of the House of Representatives is elected at the beginning of each Congress. He is charged with the duty of disbursing each Member's clerk hire allowance to those designated by the Member as his clerks. 2 U.S.C. § 92; Rules of the House of Representatives, Rule III. The Disbursing Office is the particular section of the Clerk's office which performs this duty. See testimony of Harry Newlin Megill, which forms part of the record in this case.

A so-called Clerk Hire form filed with the Disbursing Office of the House, therefore, is in legal effect filed with the Clerk of the House. The sole question for decision on this appeal thus becomes whether the Clerk is a department or agency of the United States within the meaning of 18 U.S.C. § 1001.

The word "department" is defined for the purposes of Title 18 by 18 U.S.C. § 6, which provides:

> "The term 'department' means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government."

It is of course evident that neither Congress nor any office thereof is one of the executive departments enumerated in Title 5, for these departments include only the so-called Cabinet departments. It is likewise clear that there is nothing in the context of 18 U.S.C. § 1001 which remotely suggests that the term "department" was intended to describe the executive, legislative, or judicial branches of the government.

"Context" as defined by Webster's New International Dictionary (1939 ed.), means "[t]he part or parts of a discourse preceding or following a 'text' or passage or a word, or so intimately associated with it as to throw light upon its meaning." If, for example, Congress passed a statute dealing with the compensation of employees of the federal judiciary which referred at one point to "employees of such department," it would be plain from the context that the term "department" had reference to the judicial branch of the government. Comparison of § 1001 with such an example makes it abundantly clear that there is here no context indicating that the term "department"

signifies anything other than the executive departments enumerated in Title 5.

2. *Disbursing Office Not an "Agency"*

The meaning of the term "agency", as used in Title 18, is also defined by §6 thereof, which states:

> "The term 'agency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, *unless the context shows that such term was intended to be used in a more limited sense.*" (Emphasis added.)

Not even by a strained and unnatural interpretation of the foregoing language can the Clerk of the House of Representatives be brought within its terms. This definition was plainly framed for the sole purpose of providing a simple designation for all of the ramifications of the executive branch of the government, many of which are independent of the Cabinet departments. The definition employs apt words to describe the Civil Service Commission, the Tennessee Valley Authority, and the National Labor Relations Board. It certainly does not describe the Clerk of the House of Representatives.

That this failure was intentional is conclusively demonstrated by the reviser's notes. Particularly illuminating is the note following 18 U. S. C. §296, which states:

> "*To clarify meaning of 'executive department'* word 'executive' before 'department' was deleted and *words 'or agency' were inserted* after it." (Emphasis added.)

The reviser's language following §§286, 287, and 437 is quite similar to the foregoing, stating that the word "agency" was inserted "to clarify" the meaning of the

word "department" or "departments". It is clear that the term "department" as used in each of these statutes has reference only to the executive departments enumerated in Title 5.

The notes following § 201, 602, and 607 are slightly different but equally pertinent. The reviser there states that the word "agency" was inserted to cover "independent agencies or Government owned or controlled corporations." Obviously neither of these categories embraces legislative or judicial officers.

The reviser has thus unequivocally stated that the signification of the term "agency" is limited to the executive branch of the government. The almost conclusive weight of such authority has been repeatedly recognized by this Court. *Western P. R. Corp.* v. *Western P. R. Co.*, 345 U. S. 247, 255; *United States* v. *National City Lines*, 337 U. S. 78, 81; *Ex parte Collett*, 337 U. S. 55.

If further evidence is needed, however, it may be found in definitions of the term "agency" in other parts of the Code, which indicate a uniform understanding on the part of Congress that this term constitutes an apt description of executive instrumentalities alone. While these definitions are not applicable as such to Title 18, they indicate the common signification of the term, which is the framework in which the definition of § 6 must operate.

The first of these definitions is found in 5 U. S. C. § 139 (c), which states:

> "The term 'Federal agency' means any *executive* department, commission, independent establishment, corporation owned or controlled by the United States, board, bureau, division, service, office, authority, or administration *in the executive branch of the Government*." (Emphasis added.)

Another is found in 5 U. S. C. §1001, which states:

> "'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States *other than Congress, the courts*, or the governments of the possessions, Territories, or the District of Columbia." (Emphasis added.)

22 U. S. C. §802 gives the following definition:

> "'Government agency' means any *executive* department, board, bureau, commission, or other agency *in the executive branch of the Federal Government*, or any corporation wholly owned (either directly or through one or more corporations) by the United States;" (Emphasis added.)

Similar language is found in 41 U.S.C. §103:

> "The term 'Government agency' means any *executive* department of the Government, or any administrative unit or subdivision thereof, any independent agency or any corporation owned or controlled by the United States *in the executive branch of the Government*, and includes any contracting agency." (Emphasis added.)

The same language appears in 42 U.S.C. §1818:

> "The term 'Government agency' means any *executive* department, commission, independent establishment, corporation wholly or partly owned by the United States which is an instrumentality of the United States, board, bureau, division, service, office, officer, authority, administration, or other establishment, *in the executive branch of the Government*." (Emphasis added.)

44 U.S.C. §304 provides:

> "[T]he terms 'Federal agency' or 'agency' mean the President of the United States, or any *executive* department, independent board, establishment, bureau, agency, institution, commission or separate office *of the administrative branch of the Government* of the

United States *but not the legislative or judicial branches of the Government;*" (Emphasis added.)

See also 31 U.S.C. §665, 42 U.S.C. §1855a, and 50 U.S.C. §403 a, which contain language similar to that of the foregoing statutes.

The decided cases also reveal a uniform understanding that the term "agency" is not applicable to all three branches of the government. In *Bush Terminal Buildings Co.* v. *Comm'r*, 204 F. 2d 575, for example, the Second Circuit held that a federal constitutional court having jurisdiction of the taxpayer's reorganization proceedings was not "any Federal agency authorized to exercise regulatory power over such corporation," within the meaning of §22 (b) (9) (B) of the Revenue Act of 1939, c. 247, 53 Stat. 862. Likewise, in *United States* v. *Adams*, 115 F. Supp. 721, the court held that a federal court was not a "department, agency, court martial, officer, or any civil, military or naval commission," within the meaning of 18 U.S.C. §281.

The case of *Romney* v. *United States*, 167 F. 2d 521, cert. denied 334 U. S. 847, does not support the government's position for two reasons. In the first place, the applicability of the statute to the legislative branch of the government was not discussed. This Court recently reiterated that no case may be considered authority on an issue not raised. *L. A. Tucker Truck Lines* v. *United States*, 344 U. S. 33.

Moreover, revised Title 18 did not go into effect until after the *Romney* case was decided. There was in existence at that time no predecessor of present 18 U.S.C. §6. The terms "department" and "agency" had not been statutorily defined for the purposes of Title 18. Nor was present 18 U.S.C. §1001 yet in existence. The *Romney* case manifestly cannot constitute authority upon the meaning of a statute enacted *after* it was handed down.

3. Legislative Intent behind 18 U.S.C. §1001

The legislative history of §1001 clearly demonstrates that Congress did not intend it to apply to the legislative and judicial branches of the government. The Act of March 4, 1909, c. 321, §35, 35 Stat. 1095, as amended by the Act of October 23, 1918, c. 194, 40 Stat. 1015, made it a crime to present any false claim "to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder," or to make any false statement "for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder."

This Act was amended by the Act of June 18, 1934, c. 587, 48 Stat. 996. The 1934 Act left unchanged the provisions of the earlier law regarding false claims, but it amended the false statement provision to embrace such statements made "in any matter within the jurisdiction of any department or agency of the United States," eliminating the requirement of relationship to a false claim or intent to defraud.

The purpose of this Amendment, as set out in S. Rep. No. 1202, 73rd Cong., 2d sess., was as follows:

> "The first two committee amendments were proposed by the Department of the Interior for the purpose of reaching a large number of cases involving the shipment of 'hot' oil, where false papers are presented in connection therewith, and also those cases within the Public Works Administration where contractors are performing work payable from the Public Works Administration appropriation, and false certificates are made as to actual wages paid."

The language here in question was thus adopted solely to cover evils in the executive branch of the government.

It is highly significant that the first part of the 1909 Act, which is now 18 U.S.C. § 287, refers to persons and officers in the civil, military, or naval service of the United States, while the 1934 amendment to that Act, which is now § 1001, contains no such language. Officers of the legislative and judicial branches of the government probably fall within the scope of this language. Its omission from the 1934 amendment strongly indicates that Congress did not intend § 1001 to cover statements made to such persons. Moreover, when Congress intends a statute to extend to the legislative branch of the government, it usually so states in positive terms. 18 U.S.C. § 201, for example applies to:

> "any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, . . ."

Similar language is set forth in 18 U.S.C. § 202, which is made applicable to:

> "Whoever, being an officer or employee of, or person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof, or an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, . . ."

The language of 18 U.S.C. § 1505 is likewise illuminating.

> "Whoever corruptly, or by threats or force, or by any threatening letter or communication endeavors to influence, intimidate, or impede any witness in any

> proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; . . ."

If, as urged by appellant, Congress were a department and agency of the United States, there would be no occasion for these statutes to refer *both* to departments and agencies *and* to Congress. It may consequently be concluded that Congress does not understand the phrase "department or agency" to embrace the legislative branch of the government.

4. *Consequences of Appellant's Position*

Any other conclusion would lead to consequences which could not possibly have been intended by Congress. The maximum penalty prescribed for perjury under 18 U.S.C. § 1621 is five years imprisonment and $2,000 fine, while the maximum penalty under § 1001 is five years imprisonment and $10,000 fine. If § 1001 were applicable to false statements made to any branch of the federal government, this statute would provide a heavier penalty for perjury than the perjury statute itself. And this penalty could be imposed upon witnesses in federal courts or before congressional committees regardles of whether they had been duly sworn and regardless of whether the government had complied with the "two witness" rule. The very fact that no such attempt has been made in the twenty years since the predecessor of § 1001 was first enacted is almost conclusive evidence that the statute does not extend to the legislative or the judiciary. See *United States* v. *Williams*, 341 U.S. 70, 81; *F.P.C.* v. *Panhandle E.P.L. Co.*, 337 U.S. 498, 513-514; *United States* v. *Cooper Corp.*, 312 U.S. 600, 613-614; *F.T.C.* v. *Bunte Bros.*, 312 U.S. 349, 35-352.

Appellant cannot avoid this issue by suggesting that, while the Clerk of the House is an "agency" within the meaning of 18 U.S.C. § 6, the House itself is not. If, as suggested in appellant's jurisdictional statement, the Clerk's office is an "authority" of the United States, there is no reason whatsoever to suppose that the House itself, and every committee of the House, is not also an "authority" of the United States. Unless that term is restricted to the executive department, it cannot logically be restricted at all, but must embrace every organ of federal power, including Congress and the courts.

5. *Applicable Principles of Statutory Construction*

In interpreting § 1001, we must remember that we are dealing with a penal statute. It has always been axiomatic that there are no constructive offenses. Before a man can be punished, his conduct must be plainly and unmistakably within the prohibition of the statute. He may not be condemned for an offense which the statute, though inadvertently, has omitted to condemn, although the court is convinced that the legislature, if it had thought about the matter, would have employed broader language. Cases illustrating these principles include *United States* v. *Halseth*, 342 U.S. 277; *M. Kraus & Bros.* v. *United States*, 327 U.S. 614, *Viereck* v. *United States*, 318 U.S. 236; *Pierce* v. *United States*, 314 U. S. 306; *United States* v. *Resnick*, 299 U. S. 207; *McBoyle* v. *United States*, 283 U. S. 25; *United States* v. *Fruit Growers Express Co.*, 279 U. S. 363; *Krickman* v. *United States*, 256 U. S. 363; *United States* v. *Weitzel*, 246 U. S. 533; *United States* v. *Harris*, 177 U. S. 305; *United States* v. *Wiltberger*, 5 Wheat. 76; *Fasulo* v. *United States*, 272 U. S. 620.

As Mr. Justice Holmes stated in the McBoyle case, at 283 U. S. 27-28:

> "Although it is not likely that a criminal will carefully consider the text of the law before he murders

> or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. . . . [T]he statute should not be extended . . . simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used."

In *Harrison* v. *Vose*, 9 How. 372, 378, the rule was stated in the following language, which is very similar to that employed by the court below:

> "In the construction of a penal statute, it is well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent [defendant]."

While the prosecution contends that appellee's conduct was within the prohibition of §1001, it cannot seriously contend that his conduct was *plainly* and *unmistakably* within the prohibition of this statute. Nor can it contend with honesty that the question is free from grave doubt. Consequently, under the rule of the foregoing cases, the judgment of the court below must be affirmed.

Conclusion

It is thus clear that the Disbursing Office of the House of Representatives, which is a part of the office of the Clerk of the House, is neither a department nor an agency of the United States within the meaning of 18 U.S.C. §1001, because these terms apply only to the executive branch of the government. There is affirmative evidence that this conclusion comports with the legislative intent behind this statute.

If in fact §1001 were applicable to all three branches of the government, the perjury statute would have long ago passed into oblivion. The fact that this has not occurred demonstrates irrefutably the fallacy of appellant's position.

Since §1001 is a penal statute, moreover, the judgment of the court below would have to be affirmed even if there were grave uncertainty regarding the applicability of this statute to the Disbursing Office of the House of Representatives. While appellant contends that the statute covers this case, it cannot seriously contend that the matter is free from grave uncertainty. Consequently, since it is obvious that appellee's conduct was not plainly and unmistakably within the prohibition of the law, there is no necessity for further argument in this case.

WHEREFORE, appellee moves that the judgment of the District Court should be affirmed.

Respectfully submitted,

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